ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5276

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-3626-DLF

CORRECTED BRIEF OF AMERICAN OVERSIGHT AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel submits the following certification:

(A) Parties and Amici.

To counsel's knowledge, except for the following amici, all other parties, intervenors, and amici who have appeared before this Court are as stated in the Opening Brief for Plaintiff-Appellant:

American Oversight
Electronic Privacy Information Center
Electronic Frontier Foundation

(B) Rulings Under Review.

The rulings at issue appear in the Opening Brief for Plaintiff-Appellant.

(C) Related Cases.

Any related cases appear in the Opening Brief for Plaintiff-Appellant.

Dated: March 30, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amicus curiae hereby submits the following corporate disclosure statement:

Amicus curiae American Oversight has no parent corporation, and no publicly held company owns any of its stock.

Dated: March 30, 2022

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GLOSSARY OF ABBREVIATIONS

CREW: Citizens for Responsibility and Ethics in Washington

FOIA: Freedom of Information Act

JA: Joint Appendix

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Opening Brief for Plaintiff-Appellant.

AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

Amicus curiae American Oversight is a nonpartisan, nonprofit section 501(c)(3) organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials, particularly through the use of Freedom of Information Act (FOIA) requests. American Oversight has substantial experience and expertise in the practical workings and procedural mechanisms of FOIA. Amicus also frequently litigates FOIA cases, and anticipates confronting withholdings made pursuant to FOIA Exemption 4 in response to its requests. Amicus seeks to file this amicus curiae memorandum to supplement the Court's understanding of the proper scope of FOIA Exemption 4 and the potential consequences to government transparency and accountability should this Court adopt the District Court's expansive approach to the Exemption.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party, nor any person other than the amicus curiae, or their counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4).

STATEMENT REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), the undersigned counsel certify that it is necessary to separately file the following Corrected Brief of Amicus Curiae. American Oversight has significant expertise in FOIA law and practice, which it uses to promote transparency in government, educate the public about government activities, and ensure the accountability of government officials, including with respect to their interactions with contractors, lobbyists, and other private interests. As such, American Oversight is unique among amici to provide a perspective on the potential widespread implications that this Court's resolution of this case will have on transparency and accountability where government and private interests intersect.

Dated: March 30, 2022

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INTRODUCTION

The Freedom of Information Act (FOIA) exists to provide transparency and accountability in government by helping to ensure the public knows what the government is up to in its name. The district court's expansive reading of FOIA Exemption 4 in this case threatens these purposes. Rather than construe the exemption narrowly in accord with these principles—as demanded by the precedent of this Court and the Supreme Court, and the text of the statute—the district court's decision adopts an overbroad reading of Exemption 4 that shields the very identity of private entities doing business with the government and creates a loophole that would allow government agencies to conspire with private parties to contract around the government's transparency obligations.

Exemption 4 protects from disclosure "commercial or financial information" the government obtains from third parties that is "privileged or confidential." 5 U.S.C. § 552(b)(4). The district court below read that provision to permit the government to withhold the identities of suppliers of lethal injection drugs[2] as "commercial information" that was "confidential." JA416–22. The opinion rested its conclusion that the identity of a government contractor was confidential

[2] Specifically, the FOIA request at issue sought records related to pentobarbital, pentobarbital sodium, and Nembutal, which appellant CREW's brief describes collectively as "pentobarbital." Opening Br. Pl.-Appellant at 1 n.1, ECF No. 1940139 (hereinafter "CREW Br.").

commercial information on the potential financial harm it speculated might flow from possible negative publicity if the contractor's identity were disclosed. JA417–19.

This conclusion is flawed as a basic matter of statutory interpretation. By stretching "commercial information" so broadly as to encompass the mere identity of a government contractor, it gives that term such an elastic reading that it renders the exemption's limitation to "commercial or financial information" effectively meaningless. The opinion's reasoning also effectively conflates Exemption 4's separate and independent requirements that information must be both "commercial" and "confidential" to avoid disclosure, effectively finding a company's identity to be commercial information *because* the government and the company wished to keep the information confidential. This runs afoul of basic precepts of statutory interpretation. As the Supreme Court has emphasized when construing the text of another FOIA exemption, when Congress includes multiple requirements for the application of an exemption, each must be given "independent vitality" to give full effect to Congress's chosen text. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001).[3]

[3] The strained nature of the district court's reading is underscored by its conclusion that a company's identity is the type of information a company "customarily" treats as private, a required showing to justify invocation of the exemption. *See* JA420–22.

The district court's overbroad reading of Exemption 4, if left undisturbed, would have wide-ranging and deleterious implications for government accountability. FOIA was intended to help create an informed public, but the district court countenanced the agency's argument that here, an informed public—and subsequent free speech and free market behavior—constituted a cognizable potential commercial harm to the suppliers in this case. This contradictory reasoning does not suffice to overcome FOIA's broad interests in disclosure. The identities of private commercial enterprises profiting off the taxpayer is precisely the sort of information that animates FOIA's presumption of transparency.

Indeed, broad public policy embodied in numerous statutes establishes the importance of transparency where government and private or commercial interests intersect, such as government contracting and lobbying. Particularly troubling in the district court's analysis is the notion that agencies and government contractors can conspire to contract around the government's transparency obligations. Endorsing the district court's flawed reasoning in this case would sweep broadly and risk stifling the public's ability to assess private interests' access and influence on executive policymaking. This Court must not allow contractors or other private interests to control FOIA disclosures to conceal their dealings with federal agencies, especially those that may be unpopular or controversial. Consistent with both the basic rules of statutory interpretation and the overarching principles of

government transparency and accountability animating FOIA, this Court should reject the district court's expansive reading of Exemption 4.

ARGUMENT

I. FOIA's History and Purpose Underscore the Central Importance of Transparency and Accountability in Government.

The public's tremendous interest in government transparency and accountability was central to FOIA's passage. The movement for freedom of information began in the mid-twentieth century with journalists and others fighting against government censorship and secrecy amid concerns around political repression and McCarthyism.[4] Congress passed FOIA in 1966, and in so doing reflected an understanding that the law's purpose was one of government openness, transparency, and accountability. In recommending passage, the Senate Judiciary Committee recognized that "the theory of an informed electorate is vital to the proper operation of a democracy," but that the vastness of federal bureaucracy made it difficult for the electorate to obtain public information crucial to the people's right to self-governance. S. REP. NO. 89-813, at 37–38 (1965). Moreover, beyond addressing mere administrative hurdles to access, the law's passage underscored the importance of openness over more active—and potentially

[4] *See* Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 451, 453, 459–66 (2012); Margaret B. Kwoka, *FOIA, INC.*, 65 DUKE L. J. 1361, 1367–71 (2016). *See also* See H.R. REP. NO. 89-1497, at 2 (1966).

insidious—attempts to conceal government activity from public view. Upon signing FOIA into law, President Lyndon B. Johnson reaffirmed the principles asserted by the Committee, remarking that "a democracy works best when the people have all the information that the security of the Nation permits," and, crucially, that "freedom of information is so vital that only the national security, *not the desire of public officials or private citizens*, should determine when it must be restricted."[5]

Over the following five decades, the Supreme Court has repeatedly highlighted the primacy of FOIA to transparency and accountability, noting its purpose to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989) (the "core purpose of the FOIA" is "contribut[ing] significantly to public understanding *of the operations or activities of the government*"); *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) ("a means for

[5] Lyndon B. Johnson: "Statement by the President Upon Signing [the 'Freedom of Information Act']" (July 4, 1966), U.S. Department of Justice, https://www.justice.gov/sites/default/files/jmd/legacy/2014/04/12/remark-07-11-1966.pdf (emphasis added).

citizens to know what their government is up to" is "a structural necessity in a real democracy" (citations and internal quotation marks omitted)).

In keeping with its purpose, FOIA is predicated upon the presumption of disclosure and, consistent with that presumption and the public interest in transparency, a narrow construction of exemptions. The Supreme Court has counseled that FOIA's "basic purpose reflect[s] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976). In keeping with that philosophy favoring disclosure, the Supreme Court has repeatedly held that FOIA's enumerated exemptions must be narrowly construed. *See Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) & *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

Since FOIA's original enactment, consistent with this overarching policy in favor of disclosure, Congress and agencies have repeatedly emphasized these goals through steps taken to further promote transparency and to facilitate agency disclosures. Congress has bolstered the statute a number of times, most recently in passing the FOIA Improvement Act of 2016, which codified existing regulatory policy of the "presumption of openness," built upon the 1966 law's "policy of openness toward information within the control of the Executive Branch, and a presumption that such records should be accessible to the American public[.]" S.

REP. NO. 114-4, at 1–2 (2015). To promote this presumption, the 2016 amendment provides that even if a public record otherwise nominally falls within an exemption, the agency must release it unless disclosure would result in a foreseeable harm to an interest protected by the exemption or disclosure is prohibited by law. 5 U.S.C. § 552(a)(8). More recently still, DOJ has issued new guidance, instructing that, "[i]n case of doubt, openness should prevail," encouraging agencies to make discretionary disclosures where appropriate. Memorandum for Heads of Executive Departments and Agencies, Office of the Attorney General (Mar. 15, 2022), https://www.justice.gov/ag/page/file/1483516/download.

The district court's overbroad reading of Exemption 4 conflicts with these principles and would undermine FOIA's core purpose of keeping citizens informed as to government activities and operations.

II. The District Court's Overly Broad Interpretation of Exemption 4 Fails to Give Full Effect to the Statutory Text, Rendering the Exemption's Limitation to "Commercial or Financial Information" Meaningless and Failing to Properly Analyze the "Confidential" Requirement.

Rather than take these principles to heart and construe Exemption 4 narrowly, the district court's opinion adopts a broad reading of the exemption's text. First, the opinion endorses an elastic understanding of the term "commercial" that effectively renders the limitation of the exemption to "commercial or financial

information" meaningless. Second, the opinion conflates its analysis of what constitutes "commercial information" with its analysis of "confidentiality," circularly relying on the company's mere desire to keep its identity secret to conclude that its identity qualifies as "commercial information." This approach fails to give full effect to the statutory text. To give full effect to the text of Exemption 4, each requirement—the requirement that the information in question be "commercial or financial" and the requirement that the information be "confidential or privileged"—must impose an independent and meaningful limitation on the application of the exemption.

A. The Requirement that Covered Information Be "Commercial or Financial" Must Impose Meaningful Limitations on the Scope of Exemption 4's Application.

Exemption 4 protects from disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Consistent with basic principles of statutory interpretation, the first prong of Exemption 4—that it is limited to "commercial or financial information"—must be read to impose some meaningful constraint on the scope of potential information that can be withheld. Critically, this Court has held that though the term "commercial" is broadly interpreted, it has limits: "not every bit of information submitted to the government by a commercial entity qualifies for protection under

Exemption 4." *Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

And yet the district court's opinion in this case not only failed to read the term "commercial" to impose meaningful limits, it effectively read that word out of the statute altogether. Essentially, the opinion concluded that the companies' identities qualify as "commercial" simply because they wish to keep that information confidential. JA417–19. But this approach fails to give full effect to the entirety of the statute's text. Congress included the term "commercial" as a separate and independent requirement from "confidential" to circumscribe the scope of Exemption 4. *See* 5 U.S.C. 552(b)(4) (protected information must be both "commercial . . . *and* . . . confidential"—not commercial *or* confidential (emphasis added)). And the interpretive principle *ejusdem generis* advises that "commercial" should be understood to have comparable substance and weight to "financial," and impose comparable constraints on the types of information covered. *See Tax Analysts v. I.R.S.*, 117 F.3d 607, 614 (D.C. Cir. 1997) ("canon of statutory construction limiting general terms which follow specific ones to matters similar to those specified" (internal citations omitted)).

The Supreme Court's FOIA jurisprudence consistently emphasizes the importance of giving full effect to FOIA's statutory text. *See Klamath*, 532 U.S. at 9 ("[T]he first condition of [an exemption] is no less important than the

second[.] . . . [T]here is . . . no textual justification for draining the first condition of independent vitality."); *see also Food Mktg. Inst. v. Argus Leader Media* (*FMI*), 139 S. Ct. 2356, 2363–66, 588 U.S. ___, 8 (2019) (adopting a textualist interpretation of a FOIA exemption); *Milner*, 562 U.S. at 569 (same); *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 178 (1993) (same); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802–04 (1984) (same). As in *Klamath*, the district court's focus here on whether the information was "confidential" in evaluating whether it qualified for protection failed to give "independent vitality" to the separate, threshold requirement under Exemption 4 that the information in question be "commercial" in nature. *See Klamath*, 532 U.S. at 12.

In fact, "commercial" has traditionally been understood far more narrowly than to sweep in a company's very identity, as the district court did here. This Court gives the term "commercial" its "ordinary meaning[]" when determining whether it applies to withheld information. *Pub. Citizen*, 704 F.2d at 1290 (citations omitted). Information is considered commercial "if, in and of itself, it serves a commercial function or is of a commercial nature." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (citations and internal quotation marks omitted). In this vein, reasoning from the plain meaning of the term, courts have recognized a number of traditional and typical categories of information to qualify as "commercial" in appropriate contexts, including, to name

a few, customer lists, *Greenberg v. FDA*, 803 F.2d 1213, 1216–18 (D.C. Cir. 1986); health and safety data, *Pub. Citizen*, 704 F.2d at 1290; and trade negotiation recommendations and market analysis, *Baker & Hostetler LLP v. U.S. Dep't of Comm.*, 473 F.3d 312, 319 (D.C. Cir. 2006). But courts have not interpreted "commercial" to subsume anything that touches on any aspect of a company's business, down to its very name.

Indeed, extending "commercial information" to encompass even the identity of a government contractor vitiates the plain meaning of the term and renders the term "commercial" so expansive as to effectively remove any meaningful limitation on the scope of Exemption 4's application. If a company's name alone counts as "commercial" information, it is difficult to imagine what information about a company would *not* fall within that definition if the company wished to keep it a secret from the public.[6]

To give meaningful, independent vitality to Exemption 4's limitation to "commercial or financial information," it cannot be the case that the mere fact that a company wishes to keep its identity in a particular government contract secret suffices to make it so. The district court's opinion relies heavily on the speculative

[6] Indeed, here, the district court's very opinion confirms that a company's identity is not necessarily "commercial information." JA418 ("[A] company may not always have a commercial interest in its name and identity." (internal quotation marks omitted)). But its analysis offers no principled reason why one company's identity is "commercial" but another's is not.

potential reputational harm the contractor fears may result from disclosure of its identity. But concerns about reputational harm are not enough to render a government contractor's identity confidential commercial information. Courts have recognized that the fact that information might be embarrassing or harmful to a company's reputation does not "convert" that information into "commercial" information.[7]

In addition, as discussed above, the circular nature of this reasoning effectively conflates the two independent requirements the government must demonstrate for the application of Exemption 4, improperly collapsing the question solely into whether the company wishes to keep the information confidential (for any reason, reputational or otherwise). Whether information qualifies as "commercial" cannot be defined based on whether the company wants to keep it "confidential" if the term is to be given any independent meaning or effect. *Cf.* Klamath, 532 U.S. at 12 ("there is . . . no textual justification for draining the first condition [of Exemption 5] of independent vitality"). In other words, the government must show that information is "commercial" in and of itself, and not merely because the government or its contractor wishes to keep that information

[7] *See Pub. Citizen v. HHS*, 975 F.Supp.2d 81, 107 (D.D.C. 2013) ("While the Court appreciates that revealing [certain information] may be embarrassing or harmful to the reputation of a company, the law is well-settled that this potential consequence of a disclosure does not convert the information into 'commercial' under Exemption 4."); *see also infra* Part III.A.

"confidential." CREW Br. at 16–17. The district court's adoption of the government's approach reads the independent requirement that the information in question be "commercial or financial" out of the statute, resulting in a significantly overbroad reading of the exemption with consequences that will sweep far beyond the bounds of this case.

B. The District Court Failed to Properly Analyze Whether the Information Here at Issue Was Appropriately Treated as Confidential.

Even if the district court had properly concluded the information was covered under Exemption 4's "commercial" prong, its uncritical application of the "confidential" prong failed to meaningfully engage with the proper legal test. Instead, the court simply deferred to the government and its contractors' self-interested description of how that requirement applies to the contractors' identities.[8] Information found to be "commercial" under Exemption 4 must also

[8] The parties' arguments address whether certain contract terms (*i.e.*, information that might, in some contexts, be more traditionally understood to fall within Exemption 4's "commercial information" prong) can be kept confidential simply because disclosing it would reveal a contractor's identity. CREW Br. at 45. Thus, the question effectively comes down to whether a contractor's identity can be kept confidential under this exemption. As discussed above, if the sole basis identified in support of withholding the information is that it might disclose the identity of the government contractor, that information simply does not fall within the ambit of Exemption 4 in the first place, as it is not "commercial." *Supra* Part II.A. As discussed in this section and *infra* at Part III, that information is not appropriately treated as "confidential," either, in light of both the jurisprudence interpreting that term in the context of Exemption 4, as well as the policy ramifications of doing so.

meet the statute's "privileged or confidential" requirement to qualify for protection. The Supreme Court has held that information is "confidential" if it is "customarily and actually treated as private by its owner and provided to the government under an assurance of privacy." *FMI*, 139 S. Ct. at 2366, 588 U.S. at 2. Thus, once the district court reached the second prong of Exemption 4, the question was whether the contractor identities were "customarily and actually treated as private." *Id.*

Common sense application of this standard here underscores the extremely elastic and overbroad understanding of the exemption employed by the district court's analysis. Commercial enterprises do not "customarily and actually" treat their identity as private, nor do they ordinarily provide the name of their enterprise to the government "under assurances of privacy." Unlike the types of commercial information typically and traditionally covered by Exemption 4—such as customer lists, trade secrets, business strategies, health and safety data, and trade dispute negotiations—which companies routinely keep secret, commercial enterprises routinely publicize their identity, use it for branding purposes, register it as a trademark, and use it as a website domain.

Rather than seriously grapple with the question of whether this is the sort of information owners of commercial enterprises "customarily and actually" keep secret, however, the district court simply accepted the government's self-interested

assertion that the small handful of companies with which it contracts for pentobarbital like to keep their identities secret. To be sure, this Court has said that the relevant question is "not how the industry as a whole treats the information," but rather "how the particular party customarily treats the information." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 148 (D.C. Cir. 2001). But the government has not shown here that these entities routinely hide their identities from the world at large. Common sense dictates that surely they do not. *Cf. FMI*, 139 S. Ct. at 2366, 588 U.S. at 2 (noting that the businesses "customarily [did] not disclose [the data at issue] or *make it publicly available in any way"* (internal quotations omitted) (emphasis added)). Permitting the government and its contractors to unilaterally and artificially narrow the "customarily and actually" standard in this way would allow them to essentially exempt themselves from the reach of the FOIA. The government and its contractors should not be permitted to contract around these vital statutory obligations and evade transparency and accountability.

III. The District Court's Overbroad Reading Obstructs FOIA's Purpose, Contradicts Wider Public Policy, and Has Drastic Implications for Government Oversight.

An overbroad reading of Exemption 4's commercial prong—not to mention an illogical conception of what information is customarily treated as confidential—creates sweeping consequences that contravene FOIA and existing public policy.

Failing to read "commercial" to impose meaningful limits on what types of information may properly fall within the scope of covered "information" will have wide-ranging and deleterious consequences for transparency and accountability.

A. Allowing a Company's Mere Identity to Be Shielded as "Commercial Information" Under Exemption 4 Is Contrary to the Structure, History, and Purpose of FOIA.

The district court's decision in this matter reflects a broad overreading of Exemption 4 that would threaten FOIA's overarching purpose of transparency, running afoul of basic principles of government accountability. Its expansive formulation of Exemption 4 undermines the core purpose of FOIA to allow the public to "know what its government is up to." *See Favish*, 541 U.S. at 171. It ignores this Court's and the Supreme Court's directives to construe exemptions narrowly. *See supra* Parts I, II.A; *Rose*, 425 U.S. at 361 ("[L]imited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."). And it also contradicts FOIA's most fundamental purpose of ensuring an informed citizenry that can hold its government accountable. *See supra* Part I (citing *NLRB*, 437 U.S. at 242).

Of course, the goal of an informed public does not exist simply for the sake of itself, but so public can then *act* upon the information it obtains. If the government can withhold information about its contractors, that stifles not only the public's ability to make informed choices through elections and engage with their

elected officials, but also to voice their opinions in both the marketplace of ideas and the economic marketplace. And indeed, the government's attempt to withhold its contractors' identities in this case amounts to an effort to improperly shield them from the consequences of free speech and the effects of a free market.

The district court hangs its ruling upon the government's assertion that "pentobarbital suppliers face a serious risk to their commercial fortunes should the public become aware that they supply the drug to the government." JA418. The government complains that disclosure could potentially result in negative publicity, which could in turn affect the companies' finances by impacting consumer actions or by the companies' own possible decision to discontinue production of the drug. *See id.* at 418–19; *see generally id.* at 55–59, 70–71. But this activity is the very civic engagement that FOIA is supposed to promote.

If this Court were to endorse the notion that agencies and government contractors can insulate their interactions from public accountability simply by voluntary agreement, it could wreak havoc on the public's ability to hold government accountable. Government contracting and procurement—and the associated potential for waste, fraud, and abuse of the public fisc—is a core setting where public attention and engagement serve important public interests and where transparency promotes accountability. Sweeping company identities into

Exemption 4's definition of "commercial information" would undermine the very purpose of the statute.

B. The District Court's Interpretation Undermines Broader Public Policy that Requires Transparency of Contractors, Lobbyists, and the Government Officials Who Interact with Them.

Consistent with the principles of accountability underlying FOIA, a panoply of other law and regulation across the U.S. Code and Federal Register reflects a well-established public policy in favor of transparency where government and private or commercial interests intersect. Of particular relevance here, in government contracting, the Federal Funding Accountability and Transparency Act of 2006 requires that certain information about federal contract awards of more than $25,000 be displayed on a publicly accessible website, including, chiefly, the name and unique identifier of the entity receiving the award as well as the parent company, where applicable. Pub. L. 109-282 § 2(b), 120 Stat. 1186, 1186 (2006).[9] This information is important not only for the government's use, but it is vital to "allow[] citizens to see how their tax dollars are spent" in order to provide accountability for waste and abuse. S. REP. NO. 109-329 at 1, 3 (2006).

Similarly, the Federal Acquisition Regulations require contractors to register on the publicly accessible System for Award Management, with the stated purpose

[9] *See also* About, USASpending, https://www.usaspending.gov/about (last visited Mar. 28, 2022).

of "[i]ncreas[ing] visibility of vendor sources." 48 C.F.R. § 4.1100(a). Moreover, in the ordinary course of a full and open competitive bidding process, contracting officers must notify unsuccessful bidders and others of the successful offeror's identity, among other details of the bid. *See id.* §§ 14.409-1, 14.409-2 (for sealed bids); §§ 15.503(a)(2)(ii), 15.503(b)(1)(iii) (for negotiated acquisition). And, even where a particular bidding process is not subject to full and open competition requirements, the contractor's identity is not held secret as a matter of course.[10] In any case, none of the statutory justifications for noncompetitive contracting[11] contemplate the *contractor's* commercial interests in keeping its identity secret. Rather, even in the limited circumstances excepting a bid from the default of full and open competition, the process is still intended to facilitate prudent spending of

[10] For example, bid protest law encompasses challenges to noncompetitive procurements, which could not exist if the successful bidder's identity was concealed from protestors. *See, e.g.*, Deborah F. Buckman, Annotation, *Construction and Application of Competition in Contracting Act of 1984 ("CICA"), codified in part at 31 U.S.C.A. §§ 3301, 3304, 3551 to 3556*, 81 A.L.R. Fed. 2d 333, pt. II (2014) (collecting cases).

[11] The Federal Acquisition Regulations provides seven justifications for other than full and open competition: (1) only a single source for goods or services will satisfy agency requirements; (2) unusual or compelling urgency; (3) industrial mobilization; engineering, developmental, or research capability; or expert services; (4) international agreement; (5) authorized or required by statute; (6) national security; or (7) public interest. 48 C.F.R. §§ 6.302-1–6.302-7 (citing 10 U.S.C. § 2304(c); 41 U.S.C. § 3304).

taxpayer money and avoid prioritizing a particular contractor's own commercial interest.[12]

Aside from contractors, other private commercial entities that interact with the government are subject to disclosure requirements, as well. The Lobbying Disclosure Act imposes registration and reporting requirements on lobbyists—including those who lobby executive branch officials—and requires Congress to make these disclosures publicly available for public inspection. *See generally* 2 U.S.C. § 1601 *et seq*. In passing this law, Congress highlighted its findings that "responsible representative Government requires public awareness" of lobbying efforts. *Id.* § 1601(1). Separately, certain executive branch officials are required to file public financial disclosure reports that detail their financial holdings, recent private sector jobs, and other private interests, *see* 5 U.S.C. app. §§ 101–11, which gives the public insight into whether anything in those officials' backgrounds could be influencing their policy decisions.

The underlying purpose of these mechanisms is to ensure the government, in its relationships and interactions with companies and private interests, remains

[12] *See, e.g.*, KATE M. MANUEL, CONG. RSCH. SERV., R40516, COMPETITION IN FEDERAL CONTRACTING: AN OVERVIEW OF THE LEGAL REQUIREMENTS 2–3 (2011), https://sgp.fas.org/crs/misc/R40516.pdf ("Competition is similarly said to promote accountability by ensuring that contracts are entered into on their merits and not upon any other basis (e.g., familial or other relationships between contracting officers and contractors).").

accountable to the people. Indeed, it is when the public trust is abused that the public has the greatest interest in understanding these relationships. And FOIA provides a useful complement to transparency tools such as the Federal Funding Accountability and Transparency Act of 2006 and the Lobbying Disclosure Act. Together, these devices allow the public to assess critical issues, such as the health and safety concerns at play in the products the government procures; fraud, waste, and abuse in contracting; improper influence in policymaking; and conflicts of interest or corruption.[13] Understanding the nature and extent of government

[13] *See* JA7–9, 220–222 (Plaintiff's complaint and summary judgment briefing alleging and describing its interest in these public records in light of the history of using pentobarbital for lethal injections, including the use of compounded drugs that put clients at risk of painful death amounting to torture, as well as the history of botched executions in Texas that raised questions around the quality and sourcing of pentobarbital). More generally, the public has an interest in such issues in a number of industries, which information legally required to be made public—including records released through FOIA—can help to satisfy. *See, e.g.*, *The Poultry Industry's Influence on the Trump Administration's Response to the Pandemic*, AM. OVERSIGHT, May 11, 2021, https://www.americanoversight.org/the-poultry-industrys-influence-on-the-trump-administrations-response-to-the-pandemic; *Emails Reveal Meat Industry Influence over Government's Pandemic Response*, AM. OVERSIGHT, Sept. 16, 2020, https://www.americanoversight.org/emails-reveal-meat-industry-influence-over-governments-pandemic-response; *How the Education Department Tried to Help a For-Profit College Chain That Lied to Students*, AM. OVERSIGHT, Jul. 30, 2020, https://www.americanoversight.org/how-the-education-department-tried-to-help-a-for-profit-college-chain-that-lied-to-students; Michael LaForgia & Kenneth P. Vogel, *Inside the White House, a Gun Industry Lobbyist Delivers for His Former Patrons*, N.Y. TIMES, July 13, 2020, https://www.nytimes.com/2020/07/13/us/trump-gun-silencer-exports.html; Simon Shuster et al., *Rick Perry's Ukrainian Dream*, PROPUBLICA, Sept. 10, 2020,

interactions with private entities allows citizens to be informed and empowered to engage civically.

The district court's interpretation creates a rule that would allow contractors to conceal the very fact that they are doing business with the government. This is not only inconsistent with FOIA's purpose, but contrary to a broader recognition, reflected across the U.S. Code, that there must be public transparency where private interests interact with government activities.

C. The District Court's Interpretation Has Sweeping, Negative Implications for Government Oversight and Accountability.

This case has wide-reaching implications beyond the circumstances underlying its conception. Taken to its logical endpoint, the district court's overbroad interpretation of Exemption 4 would effectively give private interests full control to block disclosure of their activities with government agencies under FOIA. The district court concluded that an entity's mere identity can be protected "commercial information" under Exemption 4 simply because the company seeks to avoid reputational harm. *See* JA417; *see also supra* Part II.A. Without a limiting

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https://www.propublica.org/article/rick-perrys-ukrainian-dream; *DOI Records Regarding Scott Angelle and Preston Beard During 2017 and 2018*, AM. OVERSIGHT, Nov. 29, 2018, https://www.americanoversight.org/document/doi-records-regarding-scott-angelle-and-preston-beard-during-2017-and-2018 (emails between former Bureau of Safety and Environmental Enforcement Director Scott Angelle and companies that had contributed to his previous political campaign or were otherwise connected to him).

principle to this reading, entities could transform any desire to elide public accountability into a purported reputational harm and consequently render their mere identities protectible commercial information.

This is antithetical to FOIA. Beyond permitting the government and its contractors and lobbyists to avoid public accountability, the district court's Exemption 4 formulation would effectively allow companies to enter secret deals with the government and contract around the government's transparency obligations under FOIA. But the very fact that a company may wish to shield its interactions with the government highlights why it is all the more critical for the public to have access to that information.

Outside of the context of lethal injection suppliers, a number of entities provide goods or services for the government that may be unpopular, or even to which a civically active subset vocally objects. But revealing the identities of these entities is exactly what FOIA and other transparency mechanisms like the Federal Funding Accountability and Transparency Act of 2006 and the Lobbying Disclosure Act are intended to do, *see supra* Part III.B, despite (or in some cases, perhaps because of) the potential for bad press. Entities that participate in controversial contracts or government programs—whether in immigration

enforcement,[14] education,[15] intelligence,[16] defense,[17] or various other industries—

[14] *See, e.g.*, Nick Miroff, *Powered by Artificial Intelligence, 'Autonomous' Border Towers Test Democrats' Support for Surveillance Technology*, WASH. POST, Mar. 11, 2022, https://www.washingtonpost.com/national-security/2022/03/11/mexico-border-surveillance-towers/; Amy Feldman, *Meet The Startup Behind The Robot 'Dogs' Set To Patrol The Southern Border*, FORBES, Feb. 15, 2022, https://www.forbes.com/sites/amyfeldman/2022/02/15/meet-the-startup-behind-the-robot-dogs-set-to-patrol-the-southern-border/?sh=557fdab1b9a2; Jon Blistein, *Hundreds of Musicians Call for Amazon Boycott Over ICE Contracts*, ROLLING STONE, Oct. 24, 2019, https://www.rollingstone.com/music/music-news/no-music-for-ice-amazon-boycott-903074/; Rani Molla, *Microsoft, Dell, Concur: Here Are All the Tech Companies Doing Business with ICE and How Much They're Getting Paid*, VOX, July 30, 2019, https://www.vox.com/recode/2019/7/30/20728147/tech-company-ice-contracts-foia-microsoft-palantir-concur-dell; Natalie Orenstein, *Berkeley Could End Contracts with ICE Partners; Council Also Considers Amazon Boycott*, BERKELEYSIDE, Feb. 20, 2019, https://www.berkeleyside.org/2019/02/20/berkeley-could-end-contracts-with-ice-partners-council-also-considers-amazon-boycott; Aura Bogado et al., *Defense Contractor Detained Migrant Kids in Vacant Phoenix Office Building*, REVEAL, July 6, 2018, https://revealnews.org/article/defense-contractor-detained-migrant-kids-in-vacant-phoenix-office-building/; Dan Freedman & Sarah Roach, *Defense Contractor General Dynamics Tied to Border Family Separation*, CONN. POST, June 19, 2018, https://www.ctpost.com/local/article/Defense-contractor-General-Dynamics-tied-to-13008540.php.

[15] *See, e.g.*, *U.S. Dept. of Education Reverses Decision Regarding Critical Race Theory, Grants*, UTAH PUB. RADIO, July 20, 2021, https://www.upr.org/utah-news/2021-07-20/u-s-dept-of-education-reverses-decision-regarding-critical-race-theory-grants; Valerie Strauss, *Education Department Tries to Tamp Down Controversy over U.S. History/Civics Grant Program*, WASH. POST, July 19, 2021, https://www.washingtonpost.com/education/2021/07/19/controversy-teaching-us-history-biden/.

[16] *See, e.g.*, Meghann Myers, *DoD Really Has No Idea Who It's Hired to Do Private Security, Report Finds*, Military Times, July 30, 2021, https://www.militarytimes.com/news/your-military/2021/07/30/dod-really-has-no-idea-who-its-hired-to-do-private-security-report-finds/; Carol Rosenberg, *Psychologist Who Waterboarded for C.I.A. to Testify at Guantánamo*, N.Y. TIMES,

may be subject to negative publicity if their activities are disclosed. That is the point. Certainly, if a company sells the Department of Defense a $435 hammer, the company might well fear reputational harm or negative publicity from that fact coming to light. That is no reason to permit the government to keep that company's identity secret.

There are similarly broad implications for oversight activities aimed at uncovering evidence of private organizations seeking to influence government agency officials—a prominent use of FOIA in which amicus and numerous organizations and journalists engage.[18] If this Court does not reject the district court's reasoning, a special interest group that advocates or provides any sort of

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Jan. 20, 2020, https://www.nytimes.com/2020/01/20/us/politics/911-trial-psychologists.html.

[17] *See, e.g.*, Laura Dickinson, *Drones and Contractor Mission Creep*, JUST SECURITY, Aug. 5, 2015, https://www.justsecurity.org/25223/drones-contractors-mission-creep/.

[18] *See, e.g.*, MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 39-43 (2021) (cataloguing news media's uses of FOIA to reveal influence over government decision-making) ("[T]here is no question the public views governmental action differently when it knows what motivated or influenced it. These uses of FOIA are invaluable to the public's understanding of government action, and evaluations of the job their officials are performing."); *Trump Accountability*, AM. OVERSIGHT, https://www.americanoversight.org/areas_of_investigation/trump-accountability?fwp_trump_accountability_topics=ethics-conflicts (providing information regarding amicus' FOIA-driven investigations into government ethics concerns and conflicts of interest).

input on a proposed policy—whether as a registered lobbyist or otherwise[19]—could cause the government to conceal its identity from FOIA disclosure by claiming that the mere fact that it communicated with a certain official could cause reputational harm and hurt its finances as a result. Agencies have regularly released such communications without withholding the identities of the private correspondents under Exemption 4.[20] But under the district court's broad Exemption 4 interpretation, private interests seeking to influence official policy may well urge federal agencies to conceal the mere fact that they were even in communication.

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[19] The implications are perhaps more concerning in the case of the many groups and individuals that advocate policy positions to agency officials but do not fall under the Lobbying Disclosure Act's registration and disclosure requirements. *See* 2 U.S.C. § 1602(10) (defining lobbyist to exclude individuals below a particular lobbying activity minimum); *see also* 26 U.S.C. § 501 (certain tax-exempt organizations may engage in limited lobbying expenditures without registration). If their identities were FOIA-exempt, the public would have no other means to know of their lobbying activity.

[20] *See, e.g.*, *ED Correspondence Log Communications with the Heartland Institute*, AM. OVERSIGHT, Feb. 2, 2021, https://www.americanoversight.org/document/ed-correspondence-log-communications-with-the-heartland-institute; *How Members of Anti-Immigrant Extremist Groups Have Worked Closely with – and Joined – the Trump Administration*, AM. OVERSIGHT, Nov. 18, 2020, https://www.americanoversight.org/how-members-of-anti-immigrant-extremist-groups-have-worked-closely-with-and-joined-the-trump-administration; *USTR Records of Dep. Trade Representative Mahoney and Right-Wing Interest Groups* (Feb. 5, 2020), https://www.documentcloud.org/documents/6950857-USTR-20-0035-A (last visited Mar. 28, 2022); *DOI Records Regarding Offshore Drilling and Communications with Coastal State and Outside Influences*, AM. OVERSIGHT, Aug. 7, 2019, https://www.americanoversight.org/document/doi-records-regarding-offshore-drilling-and-communications-with-coastal-states-and-outside-influences.

Congress has enacted FOIA and related statutes to counteract such concerns, of government officials and private entities dealing behind closed doors at the expense of the people. A sweeping interpretation of Exemption 4 would undermine this system and keep the public in the dark about "what their government is up to." It must be rejected.

CONCLUSION

FOIA rests on the fundamental precept that "sunlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (citing L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933)). Allowing agencies to keep the identities of their contractors secret risks allowing corruption, self-dealing, and immoral use of taxpayer funds to fester in the dark. This Court, consistent with prior case law, should read "commercial" in Exemption 4 to impose meaningful limits on the scope of information potentially protectable under the Exemption. For the foregoing reasons, amicus urges the Court to reverse the district court's decision.

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Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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